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Supreme Court of the United States

October Term 1968.

No. 468

GYPSUM TRANSPORTATION, LTD.,
Petitioner,

versus

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS FOR THE STATE OF LOUISIANA.

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(2) Can a state court, in accepting Admiralty and Maritime jurisdiction for a claim of unseaworthiness in a cause of collision, deny the Petitioner defenses afforded under the substantive Admiralty and General Maritime laws of the United States by an application of the state doctrine of "sovereign immunity" of one of its state agencies before a trial on the merits? 3

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SUPREME COURT OF THE UNITED STATES

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No.

GYPSUM TRANSPORTATION, LTD.,
Petitioner,

versus

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS FOR THE STATE OF LOUISIANA.

May it Please the Court:

Petitioner, Gypsum Transportation, Ltd., (hereinafter referred to as "GYPSUM") prays for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals for the State of Louisiana entered on April 8th, 1968. A petition for rehearing was denied on May 8, 1968, by the Fourth Circuit Court of Appeals. As to that judgment a timely filed writ of certiorari to the Supreme Court of Louisiana was refused on June 4, 1968. This petition is thereby timely filed after appropriate notice to all parties in accord-

ance with the Rules of this court and the procedural laws of the State of Louisiana.

OPINION OF COURTS BELOW.

The opinion of the Fourth Circuit Court of Appeals of the State of Louisiana is unreported and a copy thereof annexed hereto as Appendix "A" and is also to be found in the attached record. The petition for rehearing and the denial thereof by the Fourth Circuit Court of Appeals is found in the record annexed hereto. The refusal of petitioner's writ of certiorari by the Supreme Court of Louisiana is annexed hereto as Appendix "B" and is also to be found in the attached record.

JURISDICTION.

Jurisdiction of this court is invoked under 28 USC 1257(3) and 28 USC 1251 (6) (3). A timely Petition for a Writ of Certiorari to the Supreme Court of Louisiana was refused on June 4, 1968, and this Petition for a Writ of Certiorari is filed with proper notice less than ninety (90) days after such refusal.

QUESTIONS PRESENTED.

(1) Does the state law of "sovereign immunity" insulate a State Agency against Petitioner's defensive allegation of "comparative negligence," "major-minor fault," and "both to blame" in a maritime cause of collision instituted by that State Agency in a

state court under the Admiralty and General Maritime laws of the United States?

(2) Can a state court, in accepting Admiralty and Maritime jurisdiction for a claim of unseaworthiness in a cause of collision, deny the Petitioner defenses afforded under the substantive Admiralty and General Maritime laws of the United States by an application of the state doctrine of "sovereign immunity" of one of its state agencies before a trial on the merits?

ARGUMENT.

(1) The defense of "sovereign immunity" like any defense of limited responsibility in a maritime collision, brought pursuant to the Admiralty and General Maritime laws of the United States, arise only after the determination of fault and cannot be interposed before trial to foreclose the Defendant's right to those defenses of "mutual fault," "major-minor fault," "both to blame," or "comparative negligence," which must be brought by affirmative action on its own damages.

(2) When a state court accepts the Admiralty and Maritime jurisdiction in a maritime cause of collision it cannot, by an application of State law, deprive one party of its substantive rights of defense by an application of the doctrine of "sovereign immunity" of one of its state agencies whereby the defense of "comparative negligence," "major-minor fault,"

and "both to blame" are denied that party for use at trial.

STATEMENT OF THE CASE.

This action was instituted by the Board of Commissioners of the Port of New Orleans (hereinafter referred to as "Dock Board") for damages to a certain bridge owned by it, resulting from a collision with the M/V GYPSUM QUEEN owned by the Petitioner, Gypsum. Pursuant to "Savings to Suitors Clause," 28 USC 1333 and the Admiralty Extension Act, 46 U.S.C. 740, this cause of maritime collision was instituted by this state agency in the Civil District Court for the Parish of Orleans.

In accordance with the procedural laws of the State of Louisiana, Petitioner timely answered the petition in form of general denial. Pursuant to the substantive Admiralty and General Martitime law, which controls the determination of the matter, the Petitioner, Gypsum, appeared as a "cross-libellant" as to its own damages to perfect its defense of "mutual fault," "both to blame," "major-minor fault," or "comparative negligence." In conforming to the state procedural law such claims were included in the answer and styled "Reconventional Demand."

Asserting the alleged "sovereign immunity" of this state agency the Dock Board moved for and obtained a dismissal of the "Reconventional Demand" of Gypsum, on the grounds that a reconventional demand does not lie against the state.

Appealing to the Fourth Circuit Court of Appeals of the State of Louisiana, Petitioner urged the untimely and improper application of the State law of "sovereign immunity" in this admiralty and maritime case. The Fourth Circuit Court of Appeals of the State of Louisiana in a rush to uphold the "sovereign immunity" of this state agency totally disregarded the fact that the substantive rights of the Petitioner under the applicable Admiralty and General Maritime law were being contravened by the dismissal of its defenses.

The Petition for a Writ of Certiorari filed by the Petitioner with the Supreme Court of Louisiana was refused on June 4, 1968.

This Petition for a Writ of Certiorari prays that the judgment of the Fourth Circuit Court of Appeals of the State of Louisiana be reviewed and insofar as it violates the substantive rights of the petitioner afforded it under the substantive Admiralty and General Maritime law be reversed.

REASONS FOR GRANTING THE WRIT.

(1) This state court decision is in conflict with established precedent of this court in Admiralty and General Maritime cases which is directed toward the maintenance of uniformity of application.

As will be shown below the Admiralty and General Maritime law, by well established precedent, calls upon both parties in a collision case to appear as

"libellants" as to its own damages. Thereafter, if a "mutual fault" judgment is warranted by the facts, as determined at trial, the *total* damages are computed and a judgment entered accordingly. Indeed the cases would indicate that the defending party would lose his rights to have his damages considered if he does not appear as a "libellant." The established precedent further supports that the collectibility of such judgment entered on the *total* damage of the collision is then subject to any available defenses such as "limitation of liability" or "sovereign immunity." But, clearly these defenses are not considered before a computation of the *total* damages of the collision.

This decision should be reviewed as it runs contrary to this established precedent and supports the interference by a state court, sitting in Admiralty, with the uniformity of application of the substantive Admiralty and General Maritime law. The effect of the State Court decision is the deprivation of the Petitioner's right to a defense prescribed by the substantive Admiralty and General Maritime law. Should this case be allowed to stand each state and conceivably other nations will have precedent to interpose local defenses to Admiralty case which would run counter to any uniformity of application of admiralty law with the United States.

(2) This state court decision is based on State law and totally disregards its obligation to apply the substantive Admiralty and Maritime law.

In the enthusiasm to establish the sovereign integrity of one of its state agencies, this State Court has totally disregarded its obligation to follow the substantive Admiralty and General Maritime law when accepting the jurisdictional grant of this court in this maritime case. The doctrine of "sovereign immunity" as regards this state agency is a determination made under the law of this particular state. Notwithstanding the fact that such right springs from the Eleventh Amendment of the U. S. Constitution and is thereby necessarily a federal question. However, the application of that doctrine must nevertheless conform to the proceedings and controlling law of the case. In this case the state court can only entertain this cause of maritime collision pursuant to the "Savings to Suitors Clause" (*supra*) and the Admiralty Extension Act (*supra*). In accepting that jurisdiction the State Court binds itself to apply the appropriate law of the case. This decision should be reviewed as it is evident from the effect thereof that the application of state law has been made in total disregard to the substantive Admiralty and General Maritime law.

THE LAW.

(1) Jurisdiction of the State Court:

The sole basis of jurisdiction of the Courts of the State of Louisiana in this maritime cause of collision

is pursuant to the "Savings to Suitors Clause" (*supra*) and the "Admiralty Extension Act" (*supra*). When this State Court accepted the jurisdictional grant of this court in an admiralty matter it binds itself to apply the substantive Admiralty and General Maritime laws of the United States.

(2) The State Court in accepting jurisdiction over this maritime claim must apply the substantive Admiralty and General Maritime law.

It is established precedent that when a cause of action arises under the substantive Admiralty and General Maritime law, that law governs all matters of substance, to the exclusion of State law even though the suit is brought in the State Court. (*Florida v. Mellon*, 273 U.S. 12, 71 L. Ed. 511, 47 S. Ct. 265; *Gelston v. Hoyt*, 3 Wheat (U.S.) 246, 4 L. Ed. 381; *Garrett v. Moore-McCormack Company*, 317 U.S. 239, 87 L. Ed. 239, 63 S. Ct. 246.) It is also clear that no law of the United States can be evaded by forms of local practice (*American Railroad Express Company v. Levee*, 263 U.S. 19, 68 L. Ed. 140, 44 S. Ct. 41; *Davis v. Wechsler*, 263 U.S. 22, 68 L. Ed. 143, 44 S. Ct. 13.) Further, under the laws of the United States a right sanctioned by the Maritime law may be enforced through an appropriate remedy recognized by the common law, but the rights and liabilities of the parties are measured by the standards of the Maritime law and not by State law. Therefore, no State law is valid if it works material prejudice to the characteristic features of the General Admiralty

and Maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. (*Chelentis vs. Luckenbach* S.S. Co., 247 U.S. 372, 62 L. Ed. 1171, 38 S. Ct. 501; *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475.)

(5) The State Court in accepting jurisdiction over this maritime claim, cannot, by an application of State law, contravene the rights afforded either party under the substantive Admiralty and General Maritime law.

Aside from the holdings in the *Garrett* case (*supra*) and the *American Railroad Express Company* case (*supra*) and the guidelines set down thereby, the more recent case of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 sets to rest the argument that defenses provided under State law can be granted when in conflict with the applicable general Admiralty and Maritime law.

As will be recalled in *Pope & Talbot, Inc. (supra)* the defendant sought to defeat the plaintiff's claim arising under the Jones Act by asserting the defense provided under Pennsylvania law of contributory negligence. This court very clearly set the matter at rest when it held in part:

> ". . . And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law.

Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. . . ." 346 U.S. at 409-410, 74 S. Ct. at 205, 98 L. Ed. at 151.

(4) This State Court decision has, before a trial on the merits, contravened the Petitioner's right to assert its defenses of "mutual fault," "major-minor fault," "both to blame," and "comparative negligence" by the application of the State law of "sovereign immunity" and a dismissal of its Reconventional Demand.

To this claim for damages arising from a maritime cause of collision brought in the State Court, the Petitioner, Gypsum by "Reconventional Demand" asserted its own damages so as to perfect its defense of "comparative negligence," "mutual fault," "major-minor fault" and "both to blame." On exception brought by the Dock Board the State Court dismissed the Reconventional Demand by reason of the "sovereign immunity" of that state agency. The decision sought to be reviewed by this petition erroneously sustain that dismissal.

The time honored decision of this court of *Reynolds v. Vanderbilt (NORTH STAR)*, 106 U.S. 17, 27 L. Ed.

91, 1 S. Ct. 41 clearly establishes the procedure which both parties must undertake so as to achieve a consideration of a judgment of "mutual fault." This guideline set down in 1882 has been followed in every collision case where both parties have suffered damages. Clearly, the defending party who has also suffered damages must appear as a "cross libellant" as to his own damages. Only then can a true "mutual fault" judgment be determined as clearly a "mutual fault" judgment must encompass the *total damages* of the collision.

This court in the *NORTH STAR* case (*supra*) set the procedure to be followed by the parties in the following:

> ". . . If only one party sues and the other merely defends the suit, and upon the proof it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libellant one half of the damage sustained by him; the damage of the respondent not being regarded as the subject of investigation determinable in that suit. This technical result of the form of proceeding and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one half of his damage by the other party; . . ." 106 U.S. at 22-23, 1 S. Ct. at 46, 27 L. Ed. 94.

It is therefore clear that the established uniform procedure in admiralty collision cases is that *each* party must appear as a libellant as to his own damage in order for a "mutual fault" decree to be entered. This is true because, a "mutual fault" decree speaks as to the *total damages*, and not the erroneous notion contrived by the Dock Board and the court below that "each party is entitled by law to be paid one half of his damages by the other party." (*NORTH STAR, supra.*) For it is upon this erroneous notion and misconception by the court below that the defense of "sovereign immunity" was imposed to defeat an attempt by the Petitioner, Gypsum, to have as its own damages considered in the *total* damages for purpose of a "mutual fault" decree.

Notwithstanding the fact that the state law defense of "sovereign immunity" cannot be applied to this maritime cause so as to defeat the *defenses* of Petitioner, this court in the *NORTH STAR* case (*supra*) specifically provided the *time* for assertion of such a defense of limited responsibility when it held:

> "The rule of admiralty in collision cases, as we understand it, is, that, where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount of course, is one half of the difference between the respective losses sustained. When this resulting liability of one par-

> ty to the other has been ascertained, *then, and not before,* would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it." 106 U.S. at 20, 1 S. Ct. at 43-44, 2 L. Ed. 93. (Emphasis added.)

The interpretation set forth above of the *NORTH STAR* case (*supra*) is totally consistent with that found in Gilmore and Black "The Law of Admiralty" (1957), Chapter 7, Section 7-4, p. 402, wherein it describes a "mutual fault" judgment as follows:

> "Where the fault of both vessels causes the collision, the damages are divided—that is to say, such a decree is entered as shall have the effect that *each bears half the total damages.* In effect, this involves a payment by the less injured to the more injured vessel." (Emphasis added.)

Clearly, the holding of the *NORTH STAR* case (*supra*) disclose the pitfall of a respondent merely answering and not asserting its own damages. Gilmore and Black "The Law of Admiralty" (*supra*), at p. 408, comments on these pitfalls in interpreting the *NORTH STAR* case (*supra*) as follows:

> "This means that if a vessel merely 'answers,' denying her own fault and alleging fault in the other vessel, and if the court finds both to blame, the damages sustained by the merely answering vessel cannot be taken into account; to receive

recompense, by way of set-off or otherwise, for her own damages, she must appear as libellant. Also, of course, it is only thus that she can hope, by casting the other vessel solely in fault, to recover her own full damages. The collision case is rare in which there is not at least some arguable reason for regarding both vessels at fault; in any case, the pleader will not want to throw away any chance he might have. . . ."

The effect of the Dock Board being allowed to raise its defenses of limited responsibility by arguing "sovereign immunity" before the trial and before determination of the total damages renders the decision below contrary to the *NORTH STAR* case (*supra*) holding. Clearly, such defense should be raised after the decrees are entered. (*The MANITOBA*, 122 U.S. 97, 30 L. Ed. 1095, 7 S. Ct. 1158; *The DELAWARE*, 161 U.S. 459, 40 L. Ed. 771, 16 S. Ct. 516; *The IRRAWADDY*, 171 U.S. 187, 43 L. Ed. 130, 18 S. Ct. 831; *The CHATTAHOOCHEE*, 173 U.S. 540, 43 L. Ed. 801, 19 S. Ct. 491.)

(5) The State doctrine of "sovereign immunity" cannot be interposed to deny Petitioner's rights of defenses in a maritime case.

Sovereign immunity of a state springs from the Eleventh Amendment to the Federal Constitution. Obviously, then, the issue of whether or not Eleventh Amendment governmental immunity exists in a given case is a federal question. See: *S. J. Groves &*

Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568, 571 (D.N.J. 1967); *State Highway Commission in Arkansas v. Kansas City Bridge Co.*, 81 F. 2d 689, 690-691 (8th Cir. 1936); *NA-JA Construction Corp. v. Roberts*, 259 F.Supp. 895, 897 (D. Del. 1966); *Zeidner v. Wulforst*, 197 F.Supp. 23, 25 (E.D.N.Y. 1961).

State statutes and decisions play a role in connection with the determination of the ultimate federal issue. State statutes and decisions describe the qualities, attributes and characteristics of the state agency, board, body or political subdivision involved. The federal court then measures those qualities, attributes and characteristics against federal standards and criteria for purposes of determining whether a particular state agency is the "alter ego" of the state for sovereign immunity.

Some state courts have a tendency to make generalized statements of ultimate conclusions about a state agency—statements such as "the Commission is the mere arm or alter ego of the state" or "the Department is a separate corporate entity". A federal court should as a rule not be bound by such generalized state court pronouncements, but should look to state courts and state statutes for the purpose of determining the specific characteristics of the state agency involved. The federal court should then apply those characteristics to federal standards for purposes of determining the ultimate federal question of whether the state agency is the state's alter ego and entitled to sovereign immunity. The necessity for

this distinction between the roles played by state and federal law is perhaps best described by use of an hypothetical situation. Suppose, for example, that the Miami Port Commission possesses certain characteristics and the highest court of Florida declares that the Miami Port Commission is tantamount to, or is the alter ego of, the State of Florida. Assume further that the Mobile Port Commission possesses exactly the same qualities, but the highest court in Alabama has made the pronouncement that the Mobile Port Commission is not tantamount to, and is not the alter ego of, the State of Alabama. Since Eleventh Amendment sovereign immunity is a federal question, it is not possible or logical for a federal court to decide that the Miami Port Commission is entitled to sovereign immunity while the Mobile Port Commission does not enjoy sovereign immunity. By hypothesis they possess exactly the same characteristics. If a federal court follows the general pronouncements and ultimate findings of the Florida and Alabama courts, then in effect the federal court would have made Eleventh Amendment sovereign immunity a state question rather than federal question. See: *State Highway Commission in Arkansas v. Kansas City Bridge Co.*, 81 F.2d 689, 690-691 (8th Cir. 1936).

The cases of *Workman v. Mayor, Aldermen and Commonwealth of the City of New York*, 179 U.S. 552, 45 L. Ed. 314, 21 S. Ct. 212 and *In the Matter of the State of New York*, 256 U.S. 508, 65 L. Ed. 1063, 41 S. Ct. 370 clearly recognize the national and internation-

al character of the Admiralty and Maritime law and the necessity for uniformity therein. Those cases clearly hold that admiralty proceedings which do not involve "in rem" process against the property of the political subdivision are not protected by the immunity thereof. Such is the case in question.

CONCLUSION.

The Petitioner has above illustrated that these proceedings below, although instituted in a state court, are, nonetheless, governed by the Admiralty and Maritime laws of the United States. Under the appropriate law of the case the Petitioner, in order to assert all of its defenses, must appear as a "libellant" in order to have the benefit of all defenses available to it. The dismissal of the Petitioner's claim of its own damages, by an application of "sovereign immunity" cannot be considered until the *total damages* of the collision are determined and a judgment rendered thereon. The decision of the court below precludes every possibility of there being a computation of *total damages* as the Petitioner's assertion of its own damages has been summarily dismissed.

Therefore, out of necessity to maintain uniformity of the Admiralty and Maritime law and application thereof by state courts accepting jurisdiction under the "Admiralty Extension Act" (*supra*) and "Savings to Suitor's Clause" (*supra*), Petitioner prays that the decision of the court below be reviewed and in-

sofar as it conflicts with the law of the case be reversed.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals for the State of Louisiana has been this day forwarded to all the Judges of the Fourth Circuit Court of Appeals and to all counsel of record by depositing a copy thereof, postage prepaid, in the United States mail on this ... day of August, 1968.

PAUL A. NALTY.